

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

PILCHUCK AUDUBON SOCIETY	)	
	)	
	)	<b>CPSGMHB Case No. 05-3-0029</b>
Petitioner,	)	
	)	
	)	<b>(Pilchuck V v. Mukilteo)</b>
v.	)	
	)	
THE CITY OF MUKILTEO,	)	<b>FINAL DECISION AND ORDER</b>
	)	
Respondent.	)	
	)	
	)	
	)	

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**SYNOPSIS**

*The City of Mukilteo adopted Ordinance No. 1112, the City's revised wetlands regulations, on January 24, 2004, after a lengthy process of review, study and public participation. Petitioner Pilchuck Audubon Society filed a timely challenge to the ordinance, based on a section of the ordinance which provides for reduction of wetland buffers. Pilchuck contended that the buffer reduction provision was added by the City Council after the close of public hearing and without notice and opportunity for citizens to comment, contrary to the requirements of RCW 36.70A.035(2). Pilchuck also contended that, in adopting the buffer reduction amendment, the City did not include best available science as required by RCW 36.70A.172(1).*

*The Board concurred with Petitioners. The Board was persuaded that the City's adoption of the last-minute buffer reduction provision was clearly erroneous and non-compliant with RCW 36.70A.035(2) and 36.70A.172(1). The Board remanded the Ordinance to the City of Mukilteo to complete the public process or otherwise comply with the Act. The Board established a compliance schedule but declined to enter an order of invalidity.*

**I. BACKGROUND**<sup>1</sup>

On April 12, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Pilchuck Audubon Society (**Petitioner** or **Pilchuck**). The matter was assigned Case No. 05-3-0029 and is hereafter referred to as *Pilchuck V v. Mukilteo*. Petitioner challenges the City of Mukilteo's (**Respondent** or the **City**) adoption of Ordinance No. 1112 (the **Ordinance**) updating the

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<sup>1</sup> For more complete details see Appendix – A, Chronological Procedural History.

City's wetlands regulations. Petitioner asserts noncompliance with Growth Management Act (**GMA**) requirements for public participation and use of best available science related to critical areas.

The Board issued a notice of hearing, conducted the prehearing conference and issued its prehearing order (**PHO**) setting forth the schedule and Legal Issues to be decided. There were no motions to supplement the record nor dispositive motions filed in this matter.

During July and August the Board received timely briefing from all the parties. Hereafter, the briefs are noted as follows: Petitioner's Prehearing Brief (**Pilchuck PHB**); City's Prehearing Brief (**City Response**); Petitioner's Reply Brief (**Pilchuck Reply**).

On August 8, 2005, the Board held a hearing on the merits (**HOM**) in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board Members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Board Externs Heather Bowman and Brad Paul attended. Dan Mitchell and John Zilavy represented the Petitioner. James E. Haney represented the City. Heather McCartney, Mukilteo Planning Director accompanied Mr. Haney. The Court Reporter was John M. S. Botelho, Byers & Anderson, Inc. The hearing convened at 2:04 p.m. and adjourned at approximately 4:30 p.m. A transcript of the proceeding was ordered by the Board and received on August 17, 2005. (**HOM Transcript**).

## **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW**

Pilchuck Audubon Society challenges Mukilteo's adoption of Ordinance No. 1112. Comprehensive plans and development regulations, and amendments thereto, adopted by Mukilteo pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioner to demonstrate that the actions taken by Mukilteo are not in compliance with the Act. RCW 36.70A.320(2).

The Board shall find Mukilteo in compliance with the Act, unless it determines that the City's action was clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Act. RCW 36.70A.320(3). For the Board to find Mukilteo's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to Mukilteo in how it plans for growth, consistent with the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA ... cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132

(2005). The *Quadrant* decision affirms prior State Supreme Court rulings that “[L]ocal discretion is bounded, however, by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000). Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county’s plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, 108 Wn.App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002) and cited with approval in *Quadrant*, *supra*, at fn. 7.

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

### **III. BOARD JURISDICTION**

The Board finds that the Petitioner’s PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the City’s development regulations, pursuant to RCW 36.70A.280(1)(a).

### **IV. LEGAL ISSUES AND DISCUSSION**

#### **A. THE CHALLENGED ACTION**

On February 7, 2005, the Mukilteo City Council adopted Ordinance 1112, establishing new critical areas regulations including wetland buffer requirements. Petitioners Pilchuck Audubon Society appealed the ordinance, arguing that the regulations did not comply with the “best available science” requirement of RCW 36.70A.172 [Legal Issue No. 1]. Pilchuck also contends that the City violated the public participation requirements of the GMA by enacting a last-minute amendment without providing opportunity for public comment and by failing to provide the notice required by law [Legal Issue No. 2]. Pilchuck asks this Board to declare the Ordinance invalid [Legal Issue No. 3] for substantially interfering with the goals of the GMA.

Mukilteo’s review of its wetlands regulations began many years earlier. The City of Mukilteo first adopted Interim Wetland Regulations, Ordinance 724, in 1992. Index 50, Finding of Fact (FOF) #1. The majority of Mukilteo’s wetlands were set aside in separate tracts known as Native Growth Protection Areas, with buffers of 25, 50 and 100 feet in width. *Id.* FOF #25.

Early in 2001, the City began working on updating its critical areas and wetlands regulations. The City’s on-call wetland consultant, Matthew Boyle of Pacific International Engineering, conducted a field study to classify the City’s wetlands based

on the State's 1993 rating system. *Id.* FOF #22. In December of 2001, a first draft of the resulting ordinance was circulated to affected persons and agencies for comment, along with a Determination of Non-Significance. *Id.* FOF #9. Several subsequent drafts were developed in 2002 and 2003. Draft 3, Index 143; Draft 4, Index 154.

In June of 2003, the City hired Pentech Environmental to prepare a best available science report, Pentech issued its report in mid-2003, largely confirming Matthew Boyle's wetland classifications. *Id.* FOF #22.

In February of 2004, the City held a public hearing on a draft ordinance – Draft 5, Index 157 - amending the City's Wetlands Regulations. The notice of the hearing indicated: "The staff presentation will include an overview of wetlands in the City, and update on the status of the draft wetlands ordinance, and a proposed policy direction to move towards final adoption of the draft wetland ordinance by the Mukilteo City Council." Index 174. The draft of Ordinance 1112 contained no provision for buffer reduction by percentage but provided:

(F) Buffer widths may be modified by averaging buffer widths or by enhancing buffer quality as long as the total area contained within the buffer after averaging is not less than the required buffer prior to averaging and as set forth below.

Index 173.

On March 18, 2004, Pentec Environmental submitted its updated best available science report to the Mukilteo Planning Commission. Based on buffer requirements and wetland function efficiency levels established in the best available science, the Planning Commission presented the following buffer width recommendation to the Mukilteo City council: Type 1 = 160', Type 2 = 100', Type 3 = 75', Type 4 = 50'. Index 50, FOF 28. The draft wetland ordinance was re-circulated for comment and review. *Id.* FOF #11-12.

At its April 15, 2004 meeting, the Planning Commission reviewed a Lot Impact Analysis that compared the staff-recommended buffer widths with the CTED model code buffer widths. The CTED standards impacted 640 lots, in a city with a total of 7119 lots. The staff recommendations, based on the draft BAS report and incorporated in the draft ordinance, impacted 350 lots. The Planning Commission concluded the "Shear [sic] number of lots clearly indicates that buffers can not [be] set using BAS alone for the City of Mukilteo." *Id.* FOF #30-34.

The City then determined that it would not apply new buffer widths to developed property,<sup>2</sup> because causing such lots to become non-conforming was deemed inconsistent with "[p]roperty improvements and reinvestment into the housing stock [that] is necessary in a developed community inside an urban growth boundary." *Id.* FOF #34. A second lot impact analysis identified a total of 703 vacant and underdeveloped lots in the

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<sup>2</sup> This aspect of the Mukilteo regulation is not challenged here.

city and found that existing buffer requirements impacted 29 of these lots, the staff BAS recommendation would impact 37, and the CTED model ordinance would impact 66. *Id.* FOF #43.

In August of 2004, the Washington State Department of Ecology (DOE) adopted its new wetlands classification system. In September, DOE's Erik Stockdale and wetland biologist Michael Muscarri of Pentec Environmental conducted a field study of two Mukilteo wetlands to evaluate how the new DOE classification system would affect the City's previously classified wetlands. The study indicated that there would be no major changes to existing wetland classification. *Id.* FOF #23.

On September 22, 2004, the City announced a City Council public hearing to be held October 4, 2004. Index 232, 233. The notice stated:

The purpose of the second hearing is to consider an amendment to the Mukilteo Municipal Code regarding Wetland regulation. Amendments include reasonable use provisions; public agency and utility development requirements and wetland definition, classifications, delineation, exemptions, buffers, mitigation, monitoring and maintenance requirements (Ordinance 1112).

No text of the draft wetlands regulations under consideration at the October 4, 2004, hearing has been provided, but the summary [Index 233] indicates proposed wetland buffers ranging from 300 feet to 50 feet, depending on the wetland category. The summary states that the purpose of the draft ordinance is to meet the GMA requirement that Cities "update their development regulations to protect Critical Areas based on Best Available Science." *Id.*

The City Council remained concerned about buffer sizes and their impact on private property and conducted a third lot impact analysis. "Due to the Council's concerns about wetlands buffer sizes," the Council on December 2004 asked the Planning Commission to consider the Department of Ecology (DOE) Buffer Alternative 3 methodology. Index 50, FOF #49, 51. Pentec was again engaged for a study of Mukilteo's wetlands and lot impact based on DOE's Buffer Alternative 3.

DOE Buffer Alternative 3 is a scoring system which rates water quality, hydrology and habit functions of each wetland to determine overall habitat value. *Id.* FOF #53. This alternative then allows flexibility for reduced wetland buffers under certain circumstances, where high-impact land uses are mitigated by specific strategies. Index 264, at 9. The buffer reduction must be supported by a report by a qualified specialist, using best available science, and demonstrating that "equal or better protection" of wetland functions may be achieved through the use of various "development mitigation techniques." However, the buffer reduction allowed under DOE Alternative 3 for high-impact land uses is no more than 25% and the minimum DOE buffer for wetlands of moderate habitat value is 75 feet. Index 264, at 15. This is based, in part, on DOE studies

indicating that 95% of wetland buffers of less than 50 feet suffer direct human impacts. Index 50, FOF #41.

On January 5, 2005, a notice was published for a January 20, 2005, Planning Commission meeting, which stated:

The purpose of the hearing is to consider [and] establish wetland buffers in the City's draft Wetland Ordinance according to the "Buffer Alternative 3" methodology outlined in the Department of Ecology's document titled "Freshwater Wetlands in Washington State, Volume 2: Managing and Protecting Wetlands, Appendix 8-c."

Index 245.

On January 12, before the Planning Commission meeting was held, a notice went out for a January 24 Public Hearing before the City Council. The January 12 public hearing notice was identical to the notice of the October 4, 2004, public hearing: "Amendments include ... wetland definition, classifications, delineation, exemptions, buffers, mitigation, monitoring and maintenance requirements. (Ordinance 1112)." Index 250.

On January 20, 2005, the Planning Commission recommended to the City Council wetland regulations based on DOE "Buffer Alternative 3" methodology, including the Alternative 3 buffer reduction provisions. The Planning Commission incorporated the DOE Alternative 3 language as section 17.52B.100(H) of the proposed regulation and forwarded it to the City Council as Draft 8 of Ordinance 1112. Index 249. The relevant provision, adopted from the DOE model, reads:

Buffer Reduction: Buffers may be reduced where the applicant demonstrates through a report relying on Best Available Science and prepared by a qualified specialist that the smaller buffer would provide equal or better protection than the larger buffer.

1. Buffer Alternative 3 methodology allows for a reduced buffer widths [sic] only in the following circumstances:
  - a. Buffers may be reduced from the High Intensity to Moderate Intensity Habitat values if there exists a relatively undisturbed buffer of at least one-hundred feet and development mitigation techniques are used to minimize wetland impacts.

Index 249. Revised Wetland Ordinance Public Hearing, Draft Revised Wetland Ordinance Code Section, 16-17.

On January 24, 2005, the Tuesday after the Planning Commission's Thursday meeting, the City Council held its public hearing. The Mukilteo City Council then adopted Ordinance 1112. In adopting the Ordinance, the City Council incorporated the Draft 8 requirement for scientific analysis to support buffer reduction but amended the provision

to allow a maximum percentage reduction of 40% and minimum buffer widths of 35 feet, based apparently on the City's previous regulations. Mukilteo Response, at 25. These modifications and changes were made after the close of the public hearing on January 24, 2005. *Id.*

The relevant provision of the Ordinance as adopted reads:

H. Buffer Reduction: Buffers may be reduced by no more than forty percent (40%) of the "High Intensity" standard buffer width, but the remaining buffer may not be less than thirty-five (35) feet, where the applicant demonstrates through a mitigation report relying on Best Available Science and prepared by a qualified specialist that the smaller buffer would provide equal or better protection than the larger buffer."

Petitioner Pilchuck objects that the 40% buffer reduction and 35 foot minimum buffer widths do not comply with best available science; Petitioners also complain that they were denied an opportunity to testify with regard to the last minute amendments that inserted these provisions in the Ordinance and that the City did not provide adequate notice of its action.

#### **A. LEGAL ISSUE NO. 1 – BEST AVAILABLE SCIENCE**

The Board's Prehearing Order states Legal Issue No. 1 as follows:

*Does the adoption of Ordinance 1112, adopting and updating a critical areas ordinance, fail to comply with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170 and RCW 36.70A.172 when the regulations fail to consider best available science in establishing protections for the functions and values of critical areas?*

#### **Applicable Law**

RCW 36.70A.060(2) and (3), require the County to adopt development regulations that designate and protect environmentally critical areas. Critical areas include: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

RCW 36.70A.170 and RCW 36.70A.172(1) require that "best available science" (**BAS**) shall be included "in developing policies and development regulations to protect the functions and values of critical areas."

#### **RCW 36.70A.172 - Critical areas - Designation and protection - Best available science to be used -**

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies

and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

The Division I Court of Appeals has held that “evidence of best available science must be included in the record and must be substantively considered in the development of critical areas policies and regulations.” *Honesty in Environmental Analysis & Legislation v. Central Puget Sound Growth Management Hearings Board (HEAL)*, 96 Wn.App. 522, 532, 979 P.2d 864 (1999). *See also Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn.App 156, 93 P.3d 885 (2004).

RCW 36.70A.020 sets out the planning goals that cities and counties are required to address in their plans and regulations adopted under the GMA. Petitioners appeal to the following goals:

(8) Natural Resource Industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open Space and Recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

## **Discussion and Analysis**

### **Positions of the Parties**

Petitioner Pilchuck argues that the Mukilteo City Council failed to use best available science in the decision to substantially deviate from the Department of Ecology’s Buffer Alternative 3 methodology in order to reduce the impacts that the new buffer widths would have on the development potential of a handful of private properties. Pilchuck PHB, at 22. HOM Transcript, at 26.

Specifically, Pilchuck contends that the Council approved a “last minute” amendment to Subsection 17.52.100(H) of Ordinance 1112 that allows for a 40 percent buffer reduction rather than the maximum 25 percent reduction allowed by the DOE Buffer Alternative 3 methodology. *Id.* Petitioner argues that the best available science report prepared by Mukilteo does not support the greater buffer reduction because the City’s decision to allow the reduction of buffer width fails to protect the values and functions of the wetlands. *Id.* at 23. Pilchuck points out that scientific understanding of wetlands has

grown considerably over the past decade: “Since the City of Mukilteo’s previous adoption of wetland regulations back in 1992, scientific data has been discovered and compiled regarding the importance of wetland protection in terms of ... maintaining a biologically rich ecosystem.” Pilchuck Reply, at 22.

Pilchuck also argues that the GMA goals were not appropriately balanced, and that the City gave undue weight to goal 5 (economic development) as against goals 8 (resource industries), 9 (open space), and 10 (environment). Pilchuck Reply, at 21.

Mukilteo responds that it properly included best available science in enacting Subsection 17.52.100(H) of Ordinance 1112. The City denies that the reduction in buffers was passed to reduce the impact of new buffer widths on properties. HOM Transcript, at 40. Respondent agrees that RCW 36.70A.172(1) requires a city to “include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” Respondent argues that the requirement to *include* means “evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.” City Response, at 15, *quoting HEAL, supra*, 96 Wn. App. at 532. Mukilteo contends that its consideration of multiple sources of best available science is sufficient to satisfy the GMA requirement, even if substantive changes were made to the Department of Ecology guidelines. *Id.*

Respondent also cites guidance in CTED criteria in support of its use of best available science: “Counties and cities should adopt procedures and criteria to ensure that the best available science is included in the review of an application for an administrative variance or exemption.” WAC 365-195-915(2). Mukilteo contends that the changes it made to the buffer reduction provisions of the DOE Buffer Alternative 3 methodology in adopting Subsection 17.52B.100(H) are the “administrative variance” or “exemption” provisions envisioned by WAC 365-195-915(2) because they authorize a limited reduction of buffer widths based on specific criteria and require a best available science report for the evaluation of each instance of permitting a reduction from standard buffer widths. City Response, at 16. Under this argument, the City is not required to show evidence that best available science was included in the decision to increase the buffer reduction because best available science only need be included in the individual applications, which Ordinance 1112 provides for. *Id.* at 17.

## **Board Discussion**

The City’s contention that best available science was included in the record sufficient to justify the 40% reduction from DOE Buffer Alternative 3 methodology is not supported by the record.

The text of the best available science document that provided the DOE Buffer Alternative 3 methodology, *Wetlands in Washington State, Appendix 8-C, Guidance on Buffers and Ratios—Western Washington*, gives two scales for buffers (stepped and graduated) based on the score for habitat functions. Regarding buffer widths, DOE stated:

Other scales are possible *as long as they keep within the limits established from the scientific information currently available*: wetlands with scores for habitat that are higher than 31 points need buffers that are at least 300-feet wide; wetlands with a score of 26 points need buffers of at least 150-feet; and buffers with a score of 22 points need buffers that are at least 100-feet wide.

These buffer widths can be further reduced by *25 percent* if a proposed project with high impact implements the mitigation measures such as those described in Table 8C-8.

Index 264, at 15. (Emphasis added.)

The DOE Buffer Alternative 3 methodology specifically limits buffer reduction to 25%, and the narrowest buffer available under Buffer Alternative 3 methodology is 75 feet, for a wetland of medium habitat value (habitat score of 19), a far larger buffer than the 35 foot minimum which Ordinance 1112 permits. *Id.* The flexibility for certain buffer reductions in the Buffer Alternative 3 scheme is clearly part of an integrated, science-based strategy whose provisions cannot be willy-nilly isolated and revised or disregarded without risks to wetland functions and values.<sup>3</sup>

DOE's buffer reduction minimums are underscored by the DOE finding that 95% of wetland buffers narrower than fifty feet suffer from encroachment. As reported by the City: "[T]he updated 2003 BAS document prepared by the Department of Ecology states that only 35% of the wetlands with buffers fifty (50) feet or greater suffered direct human impacts, compared to 95% impact on wetlands with buffers less than fifty (50) feet." Index 50, FOF #41. The DOE finding is understandable: many jurisdictions, including Mukilteo [MCC 17.52B.100(I) and (K)], allow decks, small additions, utility easements and similar encroachments within wetland buffers as well as providing exemptions for a number of activities [MCC 17.52B.040].

Thus the City's own findings indicate the high likelihood of degradation of buffers of less than 50 feet, and its own regulations allow a number of human encroachments.

Although Mukilteo argues that best available science was "included" in providing the basis for the 40% buffer reduction provision from DOE Buffer Alternative 3 methodology, nothing in the record shows that best available science was even considered in making the decision. The 50% reduction that appeared very early in the City's revision process was not informed by best available science, as discussed *supra*, and nothing in the record indicates a reduction of more than 25% is an appropriate deviation from DOE Buffer Alternative 3 methodology.

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<sup>3</sup> A mix-and-match approach would be rather like the notion that one could arbitrarily amend the dosages of a set of medical prescriptions and still protect the "functions and values" of one's personal health.

The City's argument that changes may be made from best available science recommendations without any justification for the changes would eliminate the stated purpose of the best available science requirement – protection of the functions and values of critical areas. A jurisdiction must provide some rationale for departing from science-based regulations. The Court of Appeals, Division I, in *WEAN v. Island County*, stated:

If a local government elects to adopt a critical areas requirement that is outside the range that BAS alone would support, the local agency must provide findings explaining the reasons for the departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice.

*WEAN, supra*, 93 P.3d at 894.

Mukilteo has failed to provide justification for the deviation from the DOE Buffer Alternative 3 methodology, even denying the Board's suggestion that the changes made to the buffer had a property rights or economic development basis.<sup>4</sup> HOM Transcript, at 40. The Board is unable to find any part of the record that justifies a downward departure from the buffer width requirements outlined in the scientific literature, nor any references to findings identifying the other GMA goals that are being implemented by the City's choice *See*, Index 50, FOF # 62,63, Conclusion #5.<sup>5</sup>

Mukilteo's reliance on CTED guidelines is misplaced. By satisfying WAC 365-195-915(2)<sup>6</sup>, the City has not necessarily satisfied the GMA. As recently reiterated by this Board, CTED guidelines are advisory, not obligatory. *Tahoma Audubon Society v. Pierce County*, CPSGMHB Case No. 05-3-0004c, Final Decision and Order, (July 12, 2005), at 11-12. CTED has developed a set of procedural guidelines, "to assist counties and cities in identifying and including the best available science in newly adopted policies and regulations ... and demonstrating they have met their statutory obligations under RCW 36.70A.172(1)." WAC 365-195-900. These procedural criteria provide valuable assistance to cities and counties in planning under the GMA. The CTED procedural

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<sup>4</sup> The Mukilteo regulations contain reasonable use provisions, allowing exceptions to ensure reasonable use of property that would otherwise be rendered undevelopable because of critical areas regulations. Index 50, FOF #47; MCC 17.52.025.

<sup>5</sup> Conclusion #5. The Mukilteo City Council having held an additional Public Hearing on January 24, 2005, finds that the amended Wetland Ordinance using DOE's Alternative 3 methodology provides environmental protection for the City's wetland resources and their functions, allows for enough flexibility that the methodology can be applied in an urban area while preserving the property rights of existing developed lots and parcels, and that the Ordinance as amended allows for the City of Mukilteo to balance the different mandates of the Growth Management Act.

<sup>6</sup> WAC 365-195-915(2). Counties and cities should include the best available science in determining whether to grant applications for administrative variances and exemptions from generally applicable provisions in policies and development regulations adopted to protect the functions and values of critical areas. Counties and cities should adopt procedures and criteria to ensure that the best available science is included in the review of an application for an administrative variance or exemption.

criteria provide a means of demonstrating that a jurisdiction has met its RCW 36.70A.172(1) obligations, but they are not a guarantee that a jurisdiction will effectively meet the standards set by the GMA, particularly when a jurisdiction adheres to only some of the applicable guidelines.

WAC 365-195-915(2) does not stand alone. It follows WAC 365-195-915(1)<sup>7</sup>, which guides a jurisdiction in how to demonstrate that best available science was included in the *development* of critical areas policies and regulations, as required by RCW 36.70A.172(1). The City appears to disregard WAC 365-195-915(1) regarding development of critical areas policies and regulations while appealing to the guidelines in subsection (2) with regard to administrative variances; this takes the subsection (2) guidelines out of context.

Petitioners have carried their burden of persuading the Board that the action of the City was clearly erroneous. The Board finds and concludes that the City of Mukilteo's adoption of the buffer reduction provisions was non-compliant with RCW 36.70A.172(1) which requires local jurisdictions to include best available science in establishing regulations to protect the functions and values of wetlands.

### Conclusion

The City of Mukilteo's last-minute adoption of the 40% reduction to wetland buffers, with a minimum of 35 feet, in Ordinance 1112 was **clearly erroneous**, and **did not comply** with RCW 36.70A.172(1). Therefore, the Board will **remand** the Ordinance, directing the City of Mukilteo to take legislative action to bring its wetlands regulations into compliance with RCW 36.70A.172(1) as set forth in this Order.

## C. LEGAL ISSUE NO. 2 – PUBLIC PARTICIPATION

The Prehearing Order states Legal Issue No. 2 as follows:

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<sup>7</sup> WAC 365-195-915(1) To demonstrate that the best available science has been included in the development of critical areas policies and regulations, counties and cities should address each of the following in the record....

(c) Any nonscientific information—including legal, social, cultural, economic, and political information—*used as a basis for critical areas policies and regulations that depart from recommendations derived from the best available science*. A county or city departing from science-based recommendations should:

- (i) Identify the information in the record that supports its decision to depart from science-based recommendations;
- (ii) Explain its rationale for departing from science-based recommendations; and
- (iii) Identify potential risks to the functions and values of the critical areas or areas at issue and any additional measures chosen to limit such risks.

(Emphasis added.)

*Does the adoption of Ordinance 1112 fail to comply with RCW 36.70A.035(2) and RCW 36.70A.020(11)?*

### **Applicable Law**

The goals of the GMA, which are to guide the development of comprehensive plans and development regulations, are found at RCW 36.70A.020(11). Pilchuck alleges noncompliance with Goal (11). This GMA Goal provides:

(11) Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

RCW 36.70A.035 sets forth the GMA public participation and notice provisions. Subsection(2) specifically addresses the requirements for public review of changes introduced after public comment is closed. RCW 36.70A.035(2) provides:

(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

- (i) An environmental impact statement has been prepared under chapter 43.21C RCW for the pending resolution or ordinance and the proposed change is within the range of alternatives considered in the environmental impact statement;
- (ii) The proposed change is within the scope of the alternatives available for public comment;
- (iii) The proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect;
- (iv) The proposed change is to a resolution or ordinance making a capital budget decision as provided in RCW 36.70A.120; or
- (v) The proposed change is to a resolution or ordinance enacting a moratorium or interim control adopted under RCW 36.70A.390.

## Discussion and Analysis

### Positions of the Parties

Pilchuck states that in order to meet the public participation goal under the GMA, public participation in the planning process must be early and continuous, the public must have the opportunity to review and comment on any proposed amendments or changes to local government planning, and the public must receive adequate notice of proposed changes to local planning. Pilchuck PHB, at 17. In this case, Petitioner contends, the public was not provided the required opportunity to review and comment. *Id.*

Pilchuck asserts that RCW 36.70A.035(2) is a clear expression of the Legislature's intent that the public will be continuously involved in the planning process. The GMA mandates that the public will have the opportunity to review and comment on any newly introduced amendments up to the very point at which the final version of a comprehensive plan or development regulation is adopted. Pilchuck PHB, at 8.

Pilchuck states that after the close of the final public comment period, the Mukilteo City Council proposed substantial amendments to the language of MCC 17.52B.100(H) that significantly altered the standards and criteria for buffer reductions. *Id.* at 10. When proposals to amend development regulations are introduced after the public opportunity to review and comment has passed, and the city council considers the proposals, then "an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change." *Id.* at 11.

Petitioner analogizes to *Radabaugh v. City of Seattle*, (***Radabaugh***), CPSGMHB Case No. 00-3-0002, Final Decision and Order (July 26, 2000), where the Board emphasized that the threshold inquiry in determining a violation of RCW 36.70A.035(2) is whether or not the proposed amendments to city plans or development regulations were introduced subsequent to the public opportunity to review and comment. Pilchuck PHB, at 12. In *Radabaugh*, the Board stated that when the answer to this is affirmative, the local government will have violated RCW 36.70A.035(2)(a). *Id.* Petitioner states that in this case, the general public, affected landowners, and interested stakeholders were never presented with the opportunity to review and comment on the proposed changes made January 24, 2005, before the Mukilteo City Council adopted the amended ordinance. *Id.* at 13.

Pilchuck contends that the City of Mukilteo did not meet any of the five statutory exceptions to the additional review and comment requirement of RCW 36.70A.035(2). *Id.* at 14. Petitioner asserts that the adopted changes, allowing a 40% buffer reduction to a minimum of 35 feet, do not fall under provision .035(2)(b)(ii) because this particular formulation was not introduced until after the final public comment period. *Id.* at 14.

Pilchuck also argues that the notice for the January 24, 2005, City Council Public Hearing failed to meet the requirement that it be reasonably calculated to provide adequate notice to the public. *Id.* at 14. Pilchuck asserts that the notice makes no

mention or specific reference that the buffer reduction section was to be amended. Even though there was a single reference to “buffers,” this reference did not indicate the nature of the change. This Board has held that “at a minimum, the general nature and magnitude of proposed amendments must be described” in the notice. *Id.* at 15, *quoting Orton Farms, et al., v. Pierce County (Orton Farms)*, CPSGMHB Consolidated Case No. 04-3-0007c, Final Decision and Order (August 2, 2004). Pilchuck continues that no person reading the notice of hearing published on January 12, 2005 could possibly anticipate that an amendment that reduced buffer widths by 40% or up to 35 feet would be considered. *Id.* at 16-17.

The City denies that public notice was insufficient. Although Mukilteo acknowledges that changes were made to the ordinance adopted by the Mukilteo City Council after the close of the January 24, 2005 Public Hearing, the City asserts that the adopted buffer provision is a hybrid of the previous buffer reduction provision in the City’s 1992 Municipal Code and the buffer reduction provision recommended by the Mukilteo Planning Commission (DOE Buffer Alternative 3) after the January 20, 2005 meeting, and is thus “within the scope of alternatives available for public comment” under RCW 36.70A.035(2)(b)(ii). City Response, at 25.

Mukilteo asserts that prior to adoption of the current buffer provision, the 1992 Mukilteo Municipal Code provided that buffers could be reduced up to 50% of the standard width, to not less than 15 feet. *Id.* Additionally, Drafts 3 and 4 contained a buffer reduction provision permitting a 50% reduction to not less than 25 feet. Index 143, 154. Draft 8, which was presented to the City Council and the public at the January 24, 2005 Public Hearing, permitted buffer reduction, but required that reductions be based on a report by a qualified wetland specialist relying on best available science that concludes the lesser buffer will be as effective as the standard buffer. City Response, at 25. Respondent argues that the adopted provision in Ordinance 1112 falls between these two models by retaining the Draft 8 mitigation requirements and eliminating limitations on buffer reductions in DOE Buffer Alternative 3 in favor of retaining a maximum percentage and maximum limit in reductions as provided in the then-current provision and in Drafts 3 and 4. *Id.*

Mukilteo also contends that the combined public notices from the January 20, 2005 and January 24, 2005 public hearings were sufficient to provide effective notice that (1) Mukilteo was considering amending MCC 17.52B, which provided for 50% buffer reduction, not less than 15 feet; (2) the proposal before the Mukilteo Planning Commission was to adopt DOE Buffer Alternative 3 methodology; and (3) the proposal before the City Council was to consider the amendments to the City’s Ordinance 1112 wetland regulations relating to buffers. *Id.* at 23.

## **Board Discussion**

*The parties agree that changes were made to the text of Ordinance 1112 after the close of the January 24, 2005 Public Hearing. These changes established a buffer reduction of up*

*to 40%, with a minimum buffer width of 35 feet, and the changes were adopted by the Mukilteo City Council without further public hearings on the issue.*

The Board's concern is whether the City of Mukilteo satisfied the public participation goal of the GMA – Goal 11 – and the specific requirements of RCW 36.70A.035(2). The question before the Board is twofold: (1) whether the published and mailed notices the County provided were reasonably calculated to provide notice to the public of the proposed amendments to wetland buffers; and (2) whether the terms of the adopted Ordinance fell within the scope of alternatives available for public comment so as to require no further opportunity for public review and comment before adoption pursuant to RCW 36.70A.035(2).

**1. Adequacy of notice:** Were the published and mailed notices provided by the City reasonably calculated to provide notice to the public of the proposed buffer reduction amendments?

Prior Board decisions have described the minimum components of effective notice: at a minimum, “the general nature and magnitude of the proposed amendments must be described.” *Orton Farms, supra*, at 13.

The City of Mukilteo argues that the notice for the January 24, 2005<sup>8</sup> hearing in combination with the January 20, 2005<sup>9</sup> Planning Commission notice provided sufficient information on the subject of the January 24 hearing. The Board concurs.

*Orton Farms*, relied on by Petitioners, is clearly distinguishable. There the County's Planning Commission notice which launched the comprehensive plan update process indicated: “Amendments to the Comprehensive Plan can include: Text Amendments .... T-8 Agriculture.” The subsequent mailed notice of the Pierce County Council committee consideration of 18 amendments on a range of topics included “Text Amendment – T-8 Agricultural Policies.” Finally, the published notices of the Pierce County Council

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<sup>8</sup> The January 24, 2005 public hearing notice read:

The purpose of the hearing is to consider an amendment to the Mukilteo Municipal Code regarding Wetland regulations. Amendments include reasonable use provisions; public agency and utility development requirements and wetland definition, classifications, delineation, exemptions, *buffers*, mitigation, monitoring and maintenance requirements.

Exhibit 250 (emphasis added).

<sup>9</sup> The January 20, 2005 Planning Commission notice read:

The purpose of the hearing is to consider establishing wetland buffers in the City's Draft Wetland Ordinance according to 'Buffer Alternative 3' methodology outlined in the Department of Ecology's document titled “*Freshwater Wetlands in Washington State, Volume 2: Managing and Protecting Wetlands, Appendix 8-C.*”

City Response, at 23.

meetings at which the Comprehensive Plan amendments were adopted simply states the title of the ordinance “Adopting the 2003 amendments to the Pierce County Comprehensive Plan.” *Orton Farms*, at 9-17.

On the *Orton Farms* set of facts, the Board ruled that merely indicating that there were some proposed amendments to the Plan’s Agriculture provisions was not notice reasonably calculated to provide notice to the public, including property owners, that the County was considering changing the designation criteria for agricultural lands or adopting an area-wide map amendment to designate an additional 5000 acres. *Id.* at 15. The Board ruled that the notice in *Orton Farms* was insufficient to indicate the nature of the proposed amendments. *Id.* at 17.

In the present case, amending Mukilteo’s regulation of wetlands had been a multi-year process with 13 public hearings before various bodies. HOM Transcript, at 14. Rules regarding wetland buffers were clearly at issue. The final public hearing notice specified: “Amendments include ... wetland definition, classifications, delineation, exemptions, *buffers*, mitigation, monitoring and maintenance requirements,” and the January 20, 2005, Planning Commission notice, specifying consideration of the DOE Buffer Alternative 3 methodology, provided additional detail. Particularly within the context of Mukilteo’s ongoing series of hearings regarding changes to wetland buffer requirements, the Board finds that notice was sufficient.

**2. Scope:** Did the terms of the adopted Ordinance 1112 fall within the scope of alternatives available for public comment that require no further opportunity for public review and comment before adoption under RCW 36.70A.035(2)(b)(ii)?

RCW 36.70A.035(2) provides in pertinent part:

(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

....

(ii) The proposed change is within the scope of the alternatives available for public comment;

With these provisions, the statute tries to find a thoughtful balance between the need for transparency and public input in legislative action and the need for flexibility and finality. The public is entitled to know and comment on the City Council’s proposed comprehensive plan or regulatory amendment, but at some point the elected officials

must be able to incorporate public comments in their consideration and take a final vote. The statutory language reflects these dueling goals.

RCW 36.70A.035(2) requires additional analysis and opportunity for public participation if, subsequent to public hearing, a change to a comprehensive plan is proposed which is outside the scope of what has thus far been analyzed and publicly noticed. The opportunity for review and comment on last-minute changes promised by (2)(a) would soon be lost if everything from status quo to the most aggressive option is “within the scope of alternatives” as described by (2)(b). The exception would swallow the rule. On the other hand, there are certainly cases where the status quo is a viable and even a preferred alternative, and would appropriately mark one end of an allowable spectrum.

The challenge for the Board is to apply both prongs of the statute with respect to the particular facts of the case before it.

The Board previously held in *Burrow v. Kitsap County*, CPSGMHB Case No. 99-3-0018, Final Decision and Order, (March 29, 2000), at 10, that “[t]here is no GMA requirement that the [jurisdiction] must have prepared a document for public inspection specifically proposing all elements of the amendments ultimately adopted by the [jurisdiction]; it is enough that the changes to the [jurisdiction’s] proposed amendments were within the scope of alternatives available for public comment.”<sup>10</sup>

In this case, the City may argue that discrete elements of the adopted Ordinance 1112 buffer reduction allowance were presented at separate public hearings during the course of Mukilteo’s update to its wetland regulations. The 50% reduction with minimum 25 foot buffer provision was presented in Drafts 3 and 4. Index 143, 154. The adopted “development mitigation techniques” of MCC 17.52B.100(H)<sup>11</sup> appeared in Draft 8 and

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<sup>10</sup> In *Burrow*, the Board found that the record demonstrated that the challenged proposals were within the scope of alternatives available for public review, were publicly considered at various meetings, and that the public was provided opportunity to comment before the Planning Commission and County Council. *Id.*

<sup>11</sup> Draft 8 of MCC 17.52B.100(H).

Buffer Reduction: Buffers may be reduced where the applicant demonstrates through a report relying on Best Available Science and prepared by a qualified specialist that the smaller buffer would provide equal or better protection than the larger buffer.

1. Buffer Alternative 3 methodology allows for a reduced buffer widths [sic] only in the following circumstances:
  - a. Buffers may be reduced from the High Intensity to Moderate Intensity Habitat values if there exists a relatively undisturbed buffer of at least one-hundred feet (100’) and development mitigation techniques are used to minimize wetland impacts.
  - b. For wetlands with scores less than twenty (20) points for habitat, the buffer width can be reduced to that required for moderate land uses if land development mitigation techniques are used to minimize the wetland and buffer impacts.
2. Mitigation techniques used to reduced [sic] the buffer include all of the following:
  - a. Direct lights away from the wetland.
  - b. Located [sic] the activity that generates noise away from the wetlands such as parking lots, generators, and residential uses.
  - c. Route toxic runoff from impervious area away from the wetlands including roads, parking lots and structures.

were available for public comment at both the January 20 and January 24, 2005 Public Hearings.

However, Drafts 3 and 4 of Ordinance 1112, containing the 50% buffer reduction provision that originated in the 1992 Interim Wetland Ordinance, were developed **prior to Mukilteo's best available science work applying updated scientific understandings of wetland functions, values and protective measures**. By Draft 5, dated February 19, 2004, the buffer reduction provision had been removed. Index 157. The Pentec Best Available Science report was submitted to the Mukilteo Planning Commission on March 18, 2004. Index 50, FOF #28. Thus, the earlier drafts of Ordinance 1112 that included the 50% buffer reduction were not supported by nor within the range of best available science; therefore, participants in the process could not reasonably be on notice that such an option was "within the scope of alternatives" that might be considered and adopted without additional public review and comment.<sup>12</sup>

The Board finds that the change to Ordinance 1112, allowing 40% buffer reductions to no less than 35 feet, was adopted after the opportunity for public review and comment had passed. The Board further finds that the last-minute change to buffer reduction provisions was not within the scope of the alternatives available for public comment. The Board concludes that the City of Mukilteo has failed to comply with RCW 36.70A.035(2).

### Conclusion

The Board finds that Petitioners have **failed to carry their burden of proving** non-compliance in the City of Mukilteo's public notice for its adoption of Ordinance 1112. The notices provided were **not clearly erroneous**.

However, the Board was persuaded by Petitioners that the City of Mukilteo's adoption of Ordinance 1112, specifically the wetland buffer reduction amendment, without providing an opportunity for citizen review and comment, was **clearly erroneous**, and **did not comply** with RCW 36.70A.035(2) and RCW 36.70A.020(11). Therefore, the Board will **remand** the Ordinance, directing the City of Mukilteo to provide the opportunity for public review and comment required by RCW 36.70A.035(2).

### C. INVALIDITY - LEGAL ISSUE NO. 3

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13,

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- d. Allow treated water to enter the wetland buffer.
  - e. Plant the buffer with dense vegetation at the edge of the wetland to limit pet or human use.
  - f. Utilize best management practices to control dust.

<sup>12</sup> The local jurisdiction has the discretionary authority to depart from best available science as it weighs other goals and requirements of the GMA in the light of local circumstances. *See WEAN, supra*. It is all the more important that public participation be allowed if such a departure is under consideration.

2003) at 18. Nevertheless, here Petitioner has framed the request for invalidity as Legal Issue No. 3:

*Does adoption of the challenged provisions of Ordinance 1112 substantially interfere with the goals of the Growth Management Act, thereby warranting invalidity?*

### **Applicable Law**

The GMA's Invalidity Provision, RCW 36.70A.302, provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
  - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
  - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
  - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or City. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the City or city or to related construction permits for that project.

### **Discussion and Analysis**

#### **Positions of the Parties**

Pilchuck asserts that the challenged provision of Ordinance 1112 substantially interferes with the goals of the Growth Management Act and warrants a finding of invalidity. Pilchuck PHB, at 26. Pilchuck contends that it has shown the City's actions were not guided by GMA goals 9 (open space, fish, and wildlife habitat) and 10 (protection of the environment and water quality). *Id.* Instead, according to Pilchuck, Mukilteo has chosen to interfere with these goals by lessening wetland protection below the recommendations of DOE and Pentec in order to allow more flexibility for property owners. *Id.*

Mukilteo responds that Pilchuck did not meet the heavy burden that must be carried to show noncompliance and invalidity. City Response, at 26. Respondent contends that even if Petitioner has shown that the buffer reductions are not in strict compliance with the GMA, they have not shown substantial interference with GMA goals 9 and 10. The City

requests that if a finding of invalidity be entered by the Board, it be limited to the contested subsection of the Ordinance, MCC 17.52B.100(H).

### **Board Discussion**

In the discussion of best available science and public participation, *supra*, the Board found and concluded that the City of Mukilteo's adoption of Ordinance No. 1112 was **clearly erroneous** and **non-compliant** with the best available science requirements of RCW 36.70A.172(1) and the public participation requirements of RCW 36.70A.035(2). The Board is **remanding** the Ordinance with direction to the City to comply with the requirements of the GMA.

The Board has sometimes held local government actions invalid where the GMA requirements for notice and public participation have been violated.<sup>13</sup> Invalidation prevents projects from vesting to a flawed regulation during the period of remand. In the present case, however, the parties have not provided any facts concerning a risk of vesting, and the new regulations, notwithstanding the non-compliant exception for buffer reductions, provide better wetland protection than the regulations previously in effect. Further, the City has options for expeditious compliance that limit the likelihood of projects vesting to a non-compliant regulation. The Board establishes an abbreviated compliance schedule accordingly and declines to enter an order of invalidity.

### **Conclusion**

Petitioners have failed to meet their burden of demonstrating substantial interference with the goals of the GMA. The request for an order of invalidity is **denied**.

### **V. ORDER**

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. The City of Mukilteo's adoption of Ordinance 1112 was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.172(1) and RCW 36.70A.035(2).
2. Therefore the Board **remands** Ordinance 1112 to the City of Mukilteo with direction to the City to take legislative action to comply with the requirements of the GMA as set forth in this Order.

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<sup>13</sup> See, e.g., *Kelly v. Snohomish County*, CPSGMHB Case No. 97-03-0012c, Final Decision and Order (July 30, 1997) (County redesignated land as commercial at the last minute at the last meeting); *Homebuilders v. Bainbridge Island*, CPSGMHB Case No. 00-3-0014, Final Decision and Order (February 26, 2001) (City notice indicated revision of wetland regulations without more specific information about how wetlands would be affected); *WHIP/Moyer v. Covington*, CPSGMHB Case No. 03-3-0006c, Final Decision and Order (July 31, 2003) (City adopted last minute rezoning).

3. The Board sets the following schedule for the City's compliance:

- The Board establishes **January 10, 2006**, as the deadline for the City of Mukilteo to take appropriate legislative action.
- By no later than **January 24, 2006**, the City of Mukilteo shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioners. By this same date, the City shall also file a "**Compliance Index**," listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
- By no later than **January 31, 2006**,<sup>14</sup> the Petitioners may file with the Board an original and four copies of Response to the City's SATC. Petitioners shall simultaneously serve a copy of their Response to the City's SATC on the City.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. February 9, 2006**, at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Mukilteo takes the required legislative action prior to the January 10, 2006, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 10<sup>th</sup> day of October, 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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<sup>14</sup> January 31, 2006, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

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Margaret A. Pageler  
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.<sup>15</sup>

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<sup>15</sup> Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

## APPENDIX - A

### Procedural History of CPSGMHB Case No. 04-3-0024

On April 12, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Pilchuck Audubon Society (**Petitioner** or **Pilchuck**). The matter was assigned Case No. 05-3-0029 and is hereafter referred to as *Pilchuck V v. Mukilteo*. Board member Bruce C. Laing is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Mukilteo's (**Respondent** or the **City**) adoption of Ordinance No. 1112 (the **Ordinance**) related to critical area and wetland regulations and best available science. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On April 15, 2005 the Board received a Notice of Appearance from the City.

On April 19, 2005, the Board issued a Notice of Hearing (**NOH**) setting a date for a prehearing conference (**PHC**) and establishing a tentative schedule for the case.

On May 12, 2005, the Board received Respondent's Index of Record (**Index**).

On May 12, 2005, the Board conducted the PHC at Room 2094, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board member Bruce Laing, Presiding Officer in this matter, conducted the conference, with Board member Margaret Pageler and Board extern Rachel Hendrickson in attendance. John Zilavy represented Petitioner and James Haney represented Respondent.

The Board discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board encourages such efforts and can arrange for mediation or settlement assistance by members or the Eastern or Western Growth Management Hearings Boards. If the parties are pursuing settlement, with or without Board assistance, they may so stipulate in a request for a settlement extension. The Board is empowered to grant settlement extensions for up to ninety days.

The Board then reviewed its procedures for the hearing, including the composition and filing of the Index to the record below; core documents, exhibit lists and supplemental exhibits, dispositive motions, the Legal Issues to be decided, and a Final Schedule. The parties agreed the City would provide Petitioner with a list of the Department of Community, Trade and Economic Development (**CTED**) and Department of Ecology (**DOE**) manuals related to best available science which the City utilized in preparing the Ordinance. The intention of the parties is to reach agreement on the list of manuals which will be added in an amended Index. During the discussion of Petitioner's Legal Issues, Respondent asked if petitioners Legal Issue No.1 was directed at provisions of the Ordinance beyond the 40% reduction in wetland buffer widths mentioned in Section II. of the PFR. Petitioner agreed to review the matter and transmit an e-mail response to the City and the Board by Monday, May 16, 2005. The Board directed the City to provide to the Board, prior to the deadline for motions, two copies of the following Core Documents

**(Core Docs.):** 1. Mukilteo Comprehensive Plan; 2. Chapter 17.52B Mukilteo Municipal Code (**M.M.C.**) as it existed prior to the Ordinance.

The parties agreed to the Presiding Officer's request that electronic copies of motions and briefs be submitted to the Board Administrative Officer as e-mail attachments. This is in addition to the hard copies required by the Board's rules.

On May 13, 2005, the Board issued its Prehearing Order (**PHO**) setting a final schedule for this case and the legal issues to be addressed.

On May 24, 2005, the Board received from the City the following Core Documents: **Core Doc. No. 1** – City of Mukilteo, Washington 2004 Comprehensive Plan, City Council Approved April 5, 2004; **Core Doc. No. 2** – MMC Chapter 17.52 Critical Areas Regulations and MMC Chapter 17.52B Wetland Regulations, as these regulations existed prior to adoption of Ordinance No. 1112.

On May 31, 2005, the Board received from the City the Declaration of Heather McCartney.<sup>16</sup>

On May 31, 2005, the Board received the City's Amended Document Index. (**Amended Index**).

On July 14, 2005, the Board received Petitioner's Prehearing Brief (**Pilchuck PHB**).

On July 29, 2005, the Board received the City's Prehearing Brief (**City Response**).

On August 5, 2005, the Board received Petitioner's Reply Brief (**Pilchuck Reply**).

On August 8, 2005, the Board opened the Hearing on the Merits (**HOM**) at 2:04 p.m. in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board Members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Board Externs Heather Bowman and Brad Paul attended. Dan Mitchell and John Zilavy represented the Petitioner. James E. Haney represented the City. Heather McCartney, Mukilteo Planning Director accompanied Mr. Haney. The Court Reporter was John M. S. Bothelho, Byers & Anderson, Inc.

During the HOM, the Presiding Officer distributed copies of the Boards file log for this case with instructions to the parties to notify the Board and the other party by 4:00 p.m., Thursday August 11, 2005 if any documents had been omitted from the log. The City submitted the following documents, previously requested by the Board: (1) Revised Final Draft, Use of best Available Science in City of Mukilteo Buffer Regulations, July 15, 2004, by Pentec Environmental (**HOM Exhibit No.1**); (2) Certified Copies of City of Mukilteo Ordinances No. 1112, No. 1111 and No. 1124 (**HOM Exhibit No. 2**); (3) Colored copies of Map 7, Critical Areas, City of Mukilteo 2005 Comprehensive Plan,

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<sup>16</sup> The City did not intend this declaration to be filed with the Board. Its contents became redundant when Respondent and Petitioner agreed that documents referenced in the Declaration would be included in the City's Amended Index.

Page 51 (**HOM Exhibit No. 3**). The Board also admitted a display board containing colored maps and related text which are excerpts from Index No. 190 (**HOM Exhibit No. 4**). The Board directed the City to submit two copies of Index No. 190 by close of business Thursday, August 11, 2005. The hearing was adjourned at 4:30 p.m. The Board ordered a transcript of the HOM.

On August 11, 2005, the Board received from the City “Three Lot Impact Analyses” (**Exhibit No. 190**).

On August 17, 2005, the Board received the transcript of the Hearing on the Merits (**HOM Transcript**).